COURT OF APPEAL FOR ONTARIO

CITATION: Fresco v. Canadian Imperial Bank of Commerce, 2012 ONCA 444
DATE: 20120626
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Winkler C.J.O., Lang and Watt JJ.A.

BETWEEN

Dara Fresco

Plaintiff (Appellant)

and

Canadian Imperial Bank of Commerce

Defendant (Respondent)

Louis Sokolov, Steven Barrett, David F. O'Connor and Derek McKay, for the appellant

Patricia D.S. Jackson, Stuart Svonkin, John C. Field and Lauri A. Reesor, for the respondent

Heard: November 30 and December 1, 2011

On appeal from the order of the Divisional Court (Justices Lee K. Ferrier and Katherine E. Swinton, Justice Harriet E. Sachs dissenting), dated September 10, 2010, with reasons reported at 2010 ONSC 4724, 103 O.R. (3d) 659, affirming the order of Justice Joan L. Lax of the Superior Court of Justice, dated June 18, 2009, with reasons reported at (2009), 84 C.C.E.L. (3d) 161.

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Winkler C.J.O.:

A. INTRODUCTION

[1] These reasons are released concurrently with those in *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443, and *McCracken v. Canadian National Railway*, 2012 ONCA 445. All three cases involve class actions initiated by employees seeking unpaid overtime from employers that are subject to the *Canada Labour Code*, R.S.C. 1985, c. L-2 ("*Code*"). The reasons in *Fulawka* provide an overview of the three class actions, at paras. 2-14.

[2] The present action was started by the putative representative plaintiff, Dara Fresco ("plaintiff" or "appellant"), on behalf of some 31,000 customer service employees of the defendant, Canadian Imperial Bank of Commerce ("respondent" or "CIBC"). The pleadings allege that CIBC breached its contractual and statutory duties to pay class members for overtime work that they are routinely required or permitted to perform in order to complete the common duties of their positions.

[3] The pleadings refer to the requirement in CIBC's current overtime policy that employees must obtain management approval of overtime hours in advance of working overtime, or as soon as possible thereafter in "extenuating circumstances". This pre-approval requirement is alleged to expressly place

barriers to class members' claims for overtime in violation of the *Code*. In this regard, the appellant pleads and relies on s. 174 of the *Code*, which states:

> 174. When an employee is *required or permitted* to work in excess of the standard hours of work ["standard hours of work" are defined in s. 169 of the *Code* as eight hours in a day and 40 hours in a week], the employee shall … be paid for the overtime at a rate of wages not less than one and one-half times his regular rate of wages. [Emphasis added.]

[4] The motion judge denied the motion for certification. She concluded that the appellant failed to satisfy the common issues requirement in s. 5(1)(c) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*CPA*"). The motion judge found that the cornerstone of the appellant's claim is the allegation that the pre-approval requirement in CIBC's overtime policy is illegal. According to the motion judge, it is plain and obvious that the pre-approval requirement is not illegal. She also concluded that even if the pre-approval requirement is illegal, the resolution of that issue would not advance the class members' individualized claims for unpaid overtime. The motion judge found that the proposed class action otherwise meets the requirements for certification.

[5] In reasons by Swinton J., a majority of the Divisional Court agreed with the motion judge's analysis of the criteria for certification and upheld the order denying certification. In a detailed dissent, Sachs J. explained why she would have certified the action.

[6] The relevant provisions of the *Code* are set out in the companion reasons in *Fulawka*, at paras. 32-37, and are not repeated here. However, to explain why I would allow this appeal, it is necessary to briefly describe the factual background of the proposed class action and to summarize the reasons of the motion judge, the majority of the Divisional Court, and the dissent. The principles of analysis as explained in *Fulawka* are then applied to this case. Applying these principles leads me to conclude that the appeal should be allowed and that an order should be granted certifying the action.

B. FACTS

(1) Overview of the Proposed Class Proceeding

[7] The appellant has been employed by CIBC since 1998 and has worked in a number of different branches. She has worked variously as a customer service representative ("CSR") or teller, as a head CSR, and as a personal banking assistant. She is currently a full-time head CSR.

[8] The appellant commenced this action on behalf of a proposed class of over 31,000 CSRs and other front-line customer service employees working in CIBC's more than 1,000 retail branches located across Canada from February 1, 1993 onwards.[1] Class members are non-unionized and non-managerial

[1] The original proposed class definition had no temporal limitation. The revised class definition submitted at the certification motion proposed a class period beginning on February 1, 1993: see the motion judge's reasons, at para. 47.

employees. They include full-time and part-time employees who worked as CSRs, assistant branch managers, financial service representatives, financial service associates and branch ambassadors.

[9] On behalf of the class, Ms. Fresco seeks $500 million in general damages and $100 million in punitive, aggravated and exemplary damages. She also requests multiple forms of declaratory and injunctive relief, including a declaration that CIBC's overtime policy is unlawful and unenforceable to the extent that it requires or permits class members to work overtime hours for which they will not be paid, contrary to the *Code*. She further seeks an order directing CIBC to comply with the *Code* by: i) accurately recording all hours worked by class members; and ii) paying them for all hours worked beyond their agreed upon standard hours[2] at a rate of 1.5 times their normal hourly rate, or alternatively, at their regular hourly rate up to 40 hours per week or eight hours per day and at time and a half thereafter.

[10] The plaintiff alleges that there are four systemic deficiencies in CIBC's overtime compensation system:

> (1) CIBC's overtime policy and practice unlawfully restricts overtime compensation;

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[2] CIBC's Employee Overtime Policy, effective April 2006, states that "the majority of our full time employees have regular daily work hours of 7.5 hours and weekly hours of 37.5 hours." The policy defines "overtime" as "authorized time worked by an employee in excess of 8 hours in a day or 37.5 hours in a week".

> (2) CIBC discourages class members from claiming overtime to which they are entitled;
>
> (3) CIBC fails to record the overtime hours that class members work; and
>
> (4) CIBC fails to ensure that class members are prevented from working overtime that CIBC does not intend to compensate.

(2) CIBC's Overtime Policies During the Class Period

[11] In the statement of claim, the appellant relies on CIBC's current overtime policy, titled "Employee Overtime Policy (Canada)", which came into effect on April 10, 2006 ("Current Policy"). The Current Policy was introduced following CIBC's review of its overtime pay practices in Canada and was intended to update corporate overtime practices to ensure consistency in branches across the country.

[12] The Current Policy contains the following summary:

> CIBC is committed to creating an environment where all employees across the organization are compensated equitably and according to market practices and Canadian legislation. We recognize that from time to time, management may require employees to work beyond regular hours of work and in those cases, CIBC provides additional compensation to eligible employees in the form of overtime payment or paid time off in lieu. Overtime may be authorized on an exceptional basis when management reviews and approves that the work or service involved is essential, and that overtime is the most appropriate and cost effective way of doing this work or providing this service.

[13] The Current Policy defines "overtime" as follows:

> For the purposes of this Policy, overtime is defined as pre-approved and authorized time worked by an employee in excess of 8 hours in a day or 37.5 hours in a week... and for which the employee may be entitled to compensation pursuant to their terms of employment, or by law.

[14] The Current Policy defines "employees eligible for overtime pay" as those "who received approval to work more than 8 hours a day or more than 37.5 hours per week". This policy includes the following requirement for receiving overtime compensation ("pre-approval requirement"):

> PRE-APPROVAL REQUIRED
>
> *In order for employees to be compensated for overtime hours worked, the hours must be pre-approved by a manager in advance. Overtime, for which prior management approval was not obtained, will not be compensated unless there are extenuating circumstances and approval is obtained as soon as possible afterwards.* Attached to this policy is the form to be submitted to request approval for overtime hours. [Emphasis in original.]

[15] The form for requesting approval of overtime hours is titled "Overtime Pre-Approval Form". It does not refer to obtaining after-the-fact approval for overtime already worked. The form states that "[i]t is the employee's responsibility to ensure pre-approval is obtained prior to working in excess of 8 hours per day or 37.5 hours per week."

[16] The Current Policy also provides that employees may request time *in lieu* of overtime pay, calculated at 1.5 hours off for every hour of overtime worked.

The decision to grant *lieu* time is at the manager's discretion, but a manager cannot require an employee to choose this option. If the time *in lieu* is not taken within 90 days of the overtime worked, the employee must be paid instead.

[17] Also effective April 10, 2006, CIBC implemented guidelines for managers regarding its Current Policy, titled "Overtime Policy (Canada) Manager Guidelines" ("Guidelines"). The Guidelines state:

> Management Pre-Approval – employees must receive written management approval in advance of the overtime being worked. Managers should not permit employees to work overtime hours if they have not been approved.

The Guidelines also inform managers that "overtime should only be authorized on an exceptional basis."

[18] CIBC had a previous overtime policy ("Former Policy"), effective February 1, 1993, which was in place for the first 13 years of the class period. The statement of claim does not explicitly reference or describe the Former Policy. However, the pleadings refer to "CIBC's former overtime policy, that allowed CIBC in its discretion to refuse to approve overtime after it was claimed". The pleadings assert that this policy "was unlawful".[3]

[19] The Former Policy states:

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[3] In oral argument before the Divisional Court, the appellant made it clear that she also takes issue with the Former Policy: see reasons of the majority of the Divisional Court, at para. 13.

> All employees in levels 1-5 under the new Job Grading System, will be entitled to overtime payment at the rate of 1.5 times regular salary for any time worked in excess of 8 hours per day or 37.5 hours per week.
>
> Note: Employees MUST obtain prior authorization from management before incurring any overtime.

Like the Current Policy, the Former Policy permitted employees to request time off *in lieu* of overtime pay. The Former Policy states: "Time off in lieu of payment should be for reasonable amounts and taken within 3 months of the occurrence."

[20] An attachment to the Former Policy sets out a list of questions and answers to assist managers in responding to employees' questions about the terms of the policy. In response to the posed question – "Will I get paid for the overtime I work?" – the attachment states:

> Payment of overtime to non-managerial employees who work more than 8 hours a day is a requirement under the Canada Labour Code. Time off in lieu of overtime may be granted but should be utilized ONLY for occasional overtime and the time off should be taken within 3 months of the occurrence. Prior to incurring overtime, employees MUST ensure they have the approval of their supervisor or manager. It is against the law to not pay overtime.

C. THE MOTION JUDGE'S REASONS

[21] On the appellant's motion to certify the action as a class proceeding, she submitted a list of nine proposed common issues: see the appendix to these reasons. In support of the motion, she filed affidavit evidence from herself and 12 other past and present employees of CIBC who had worked in branches in all

regions. Three of the affiants refused to be cross-examined and so their evidence was not considered. The evidence adduced by the appellant was intended to establish the routine nature of overtime work for customer service employees and CIBC's systemic failure to compensate such work.

[22] The appellant also tendered an affidavit from one of her lawyers summarizing the responses of potential class members to a survey concerning CIBC's overtime practices. The survey appeared on a website describing the class action and advising people who think they meet the class definition to register in order to receive more information about the action. The solicitor's affidavit indicates that 98 per cent of potential class members who registered on the website claim to have worked unpaid hours at CIBC.

[23] The motion judge refused to admit the solicitor's affidavit both because it was filed over CIBC's objection without the court's approval, and because it constitutes hearsay evidence and does not meet the tests of necessity and reliability (at para. 8).

[24] The appellant also filed expert evidence from Professor Judy Fudge and Dr. Graham Lowe regarding overtime practices in federally-regulated industries. This evidence indicated that the incidence of unpaid overtime among non-managerial bank employees is higher than in most other industries.

[25] The motion judge concluded that this expert evidence does not assist the appellant because it does not speak to the particular issue of unpaid overtime at CIBC (at paras. 71-77).

[26] CIBC responded with 61 affidavits, many from affiants who had worked with the appellant or with other individuals who provided affidavits in support of the motion. CIBC also filed affidavits from some of its senior officials and from various experts. In the words of the majority of the Divisional Court, at para. 22: “Essentially, the Bank took the position that there were no common issues, as the entitlement to payment for overtime must be determined on an individual basis.”

[27] The motion judge’s reasons concerning the five certification requirements are summarized as follows.

(1) Section 5(1)(a): Do the Pleadings Disclose a Cause of Action?

[28] The motion judge held, at para. 23, that the statement of claim properly pleads causes of action in breach of contract and unjust enrichment. She viewed the contentious issue as being whether CIBC’s overtime policy “is unlawful giving rise to both causes of action” (at para. 24). She then considered whether the appellant’s claim based on the illegality of the Current Policy discloses a tenable cause of action.

[29] The motion judge first assessed the lawfulness of the pre-approval requirement in the Current Policy. She found nothing objectionable with the pre-approval requirement, as explained at para. 32:

> The Policy clearly contemplates that an employee unable to complete his/her assigned work during regular hours should discuss it with the manager who either must approve the overtime or make other arrangements such that the employee does not work overtime. If unapproved (and therefore unpaid) overtime is worked, then either it was required or permitted by the manager, in which case the failure to pay is a breach of the *CLC* [*Code*] and of the Policy, or it was not required or permitted, in which case the employee has no entitlement to overtime compensation. The fact that unapproved overtime was permitted, in breach of the Policy, and was subsequently not paid, in breach of the *CLC*, does not make the Policy or its pre-approval requirement illegal.

[30] The motion judge concluded, at para. 33, that the appellant's "real complaint and the implication of the evidence that she relies on is not that the Policy is illegal, but that the Policy is not being applied at the branch level." She held that it is plain and obvious that the pre-approval requirement is not unlawful on its face.

[31] The motion judge also considered the legality of the time *in lieu* provision in the Current Policy, even though this provision was not attacked in the pleadings. She recognized that the *Code* does not explicitly allow for providing time *in lieu* in place of overtime pay. She noted that Professor Harry Arthurs, in his report, *Fairness at Work: Federal Labour Standards for the 21st Century*

(Ottawa: Human Resources and Skills Development Canada, 2006), indicates that Part III of the *Code* does not authorize a time *in lieu* option. However, the motion judge concluded that the option of receiving time *in lieu* is a more favourable benefit because it offers employees a choice. She concluded that it is therefore plain and obvious that the time *in lieu* provision is sanctioned by s. 168(1) of the *Code*, which states:

> 168. (1) This Part and all regulations made under this Part apply notwithstanding any other law or any custom, contract or arrangement, but nothing in this Part shall be construed as affecting any rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to the employee than his rights or benefits under this Part.

[32] In coming to that conclusion, the motion judge commented, at para. 44, on the importance of the choice given to the employee to take *lieu* time and the requirement on the employer to "cash out" unused *lieu* time within 90 days.

(2) Sections 5(1)(b): Identifiable Class

[33] The motion judge found that the revised class definition states an identifiable class within the meaning of s. 5(1)(b) of the *CPA*. She rejected CIBC's argument that because the definition includes class members who have no claim for overtime, the definition is "fatally over-inclusive". In the motion judge's view, at para. 49, even if many class members do not have a successful claim for overtime, they all have an interest in the resolution of the asserted common issues.

(3) Section 5(1)(c): Common Issues

[34] The motion judge explained why none of the nine proposed common issues satisfy the test for commonality under s. 5(1)(c) of the *CPA*.

[35] She observed, at para. 56, that given her determination that the Current Policy is legal on its face, there is no basis in fact for accepting proposed common issue 1 regarding whether CIBC's overtime policies from February 1, 1993 to the present are unlawful. She went on to say that "even if the Policy's pre-approval requirement is illegal, the resolution of this issue will not advance any of the claims for unpaid overtime" because "the pre-approval requirement does not cause the wrongs that are alleged." In her view, "[t]he legality of the pre-approval requirement does not assist in answering the question whether CIBC has liability for unpaid overtime."

[36] The motion judge next considered common issue 3 concerning CIBC's alleged duty to accurately record all hours worked by class members. She observed, at para. 57, that there is no evidence that CIBC systemically failed to keep records. She also concluded that because "the plaintiff does not assert any common flaw in the recordkeeping, the question of the accuracy of the records is an individual one."

[37] Regarding common issue 4, which deals with the terms of the employment contracts of class members, CIBC admitted that its duties under the *Code* and

the applicable regulations to appropriately compensate class members for overtime and to record all hours of work are incorporated into class members' employment contracts. The motion judge found, at para. 59, that the resolution of this common issue would not sufficiently advance the litigation without the certification of the more contentious liability issues.

[38] The motion judge approached common issues 2, 3.1, 5 and 6 as raising the overriding issue of whether there is a systemic policy, practice, or experience of unpaid overtime at CIBC. Regarding proposed common issue 2 (duty to prevent class members from working overtime for which they would not be compensated) and common issue 5 (breach of contract) – which she saw as being indistinguishable issues – the motion judge found there is no evidentiary foundation to show a systemic policy, practice or experience of unpaid overtime at CIBC, thus negating any commonality. After considering the affidavits of the appellant, nine class members and a branch manager, the motion judge found, at para. 62:

> This evidence shows a variety of individual circumstances that give rise to unrelated bases for unpaid overtime claims that can only be resolved individually by considering the evidence of the affiant advancing the claim, the evidence of various other current and former CIBC employees who managed and/or worked with that affiant, and various records maintained on a non-centralized basis by CIBC.

[39] She went on to say, at para. 64, that even if she were wrong in her appreciation of the evidence, the individual claims for overtime would need to be resolved in order to decide whether there was a systemic failure to pay class members for overtime hours worked.

[40] As for common issue 3.1 (whether CIBC has a duty to implement a system to ensure that it complies with its duties as alleged in common issues 2 and 3), the motion judge concluded that – to the extent this question is distinct from the question whether CIBC breached its obligation to properly compensate overtime – there is no basis for imposing such a duty on CIBC. In her words, at paras. 69-70:

> There is no factual basis for the existence of any express or implied contractual term giving rise to such a duty. CIBC's contractual obligation was to properly compensate overtime, not to perform this obligation through any particular mechanism. Nor has Ms Fresco shown any basis for some non-contractual duty arising at common law or equity. Moreover, she does not plead any cause of action in negligence or breach of fiduciary duty as in *Rumley* [*Rumley v. British Columbia,* 2001 SCC 69, [2001] 3 S.C.R. 184] or *Cloud* [*Cloud v. Canada (A.G.)* (2004), 73 O.R. (3d) 401 (C.A.)].
>
> Ultimately, the central flaw in the plaintiff's case is that instances of unpaid overtime occur on an individual basis. This lack of commonality cannot be overcome by certifying an issue that asks whether the defendant had a duty to prevent a series of individual wrongs, without any basis for the existence of this duty and where the duty does not relate to any pleaded causes of action.

[41] Having rejecting proposed common issues 1 to 6, the motion judge commented that the acceptability of common issue 6.1 on the applicable statutory limitation periods is “beside the point” (at para. 78).

[42] Finally, according to the motion judge, at para. 81, no certifiable common issue exists regarding the requested remedies of declaratory relief and damages. She was of the view that a declaration that the Current Policy or its application is unlawful would not be a matter of substantial common interest, given that the failure to pay overtime compensation “was suffered by class members on an individual basis”. She also concluded that there is no common issue with respect to damages, since an entitlement to damages will vary from class member to class member depending on the amount of unpaid overtime worked by each.

[43] The motion judge rejected the appellant’s suggestion that this action is “ideally suited” for an aggregate assessment of damages under ss. 23 and 24 of the *CPA*. In her view, this case does not meet the requirement in s. 24(1)(b) for conducting an aggregate assessment – *i.e.*, that no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant’s monetary liability. She distinguished *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321, leave to appeal refused, [2007] S.C.C.A. No. 346, for the following reasons, at para. 89:

> This case does not fit the *Markson* model. CIBC's liability does not arise from a wrongful act common to the class. There is no causal relationship between the alleged wrong and the harm or potential harm alleged – namely, that class members were not paid overtime to which they were entitled. To the extent that some employees in some CIBC branches have claims for unpaid overtime, CIBC's failure to compensate them is a breach of the Policy and a breach of contract, but this failure did not cause harm or potential harm anywhere else. The only other basis for class-wide liability is the alleged systemic policy, practice or experience of unpaid overtime, for which there is no evidentiary foundation and which cannot in any event form the basis of a class action because of the need to first determine individual issues. The plaintiff can therefore not satisfy the condition in s. 24(1)(b).

(4) Section 5(1)(d): Preferable Procedure

[44] The motion judge concluded that, had she found that there were common issues, she would have found a class proceeding to be the preferable procedure for resolving those issues, at paras. 92-98. She would not have regarded "individual hearings as a sufficient barrier in the event an aggregate assessment of damages is not available" (at para. 96).

(5) Section 5(1)(e): Representative Plaintiff and the Litigation Plan

[45] The motion judge was satisfied that the appellant is a suitable representative plaintiff, noting, at para. 102, that "[t]here is no reason to think that any other representative plaintiff would have more in common with the class." She observed that the litigation plan, as revised during the hearing, considers how the action can be managed in the event that individual damage

assessments are required. She rejected CIBC's arguments about the unmanageability of such assessments.

[46] In the result, the certification motion was dismissed because of the appellant's failure to meet the commonality requirement.

[47] In separate reasons, the motion judge awarded CIBC $525,000 in costs on a partial indemnity basis. The motion judge commented, at para. 18, that: "this award is justified by the amount in issue in the proceeding, its complexity and importance, the reasonable expectations of Ms. Fresco, the success achieved and by the principle of indemnity."

D. REASONS OF THE DIVISIONAL COURT

(1) Majority

[48] The majority of the Divisional Court held that the motion judge did not err in concluding that it is plain and obvious that the pre-approval requirement is lawful under the *Code.* In the words of the majority, at para. 52:

> In my view, the motion judge made no error of law in concluding that the Policy requirements regarding approval of overtime were lawful. The requirement of pre-approval for overtime is consistent with the provisions of the *Code*. Section 169(1) seeks to protect employees by specifying a threshold for standard hours of work and requiring employers not to cause or require them to exceed those hours. A pre-approval requirement, as the motion judge found, is a way for an employer to ensure that it complies with its obligations under the *Code*. Moreover, the current Policy provides

> for approval after the fact where there are extenuating circumstances that prevented the employee from obtaining pre-approval.

[49] The majority also agreed with the motion judge's determination that the time *in lieu* provision in the Current Policy is legal under the *Code*. The appellant had argued that the motion judge failed to consider the legality of the Former Policy, which does not have a provision permitting employees to cash out unused *lieu* time. The majority rejected this argument with the observation, at para. 61, that: "the 1993 Policy contemplates that time in lieu will be taken within 90 days. The logical implication is that payment will be made for the overtime if time is not taken, as is the case under the current Policy."

[50] Turning to the common issues, the majority agreed with the motion judge's conclusion that there are no common issues that would significantly advance the litigation. The majority emphasized that the pre-approval requirement does not cause the wrongs alleged by the appellant. The majority noted, at para. 78, that the appellant did not refer in her evidence to CIBC's overtime policy as a reason for not claiming overtime, and indeed, "she did not know of the Policy until December 2006."

[51] According to the majority, the motion judge did not commit a palpable and overriding error in finding that there is no basis in fact to support any of the proposed common issues. In the majority's words, at para. 90:

> Given the variety of jobs performed by class members, the different practices of different managers and branches, and the different experiences of the affiants put forward by the appellant, the motion judge very reasonably concluded that the evidence of the affiants did not show a common experience with respect to unpaid overtime. Therefore, there was no common issue of systemic wrongdoing that was a substantial ingredient of each class member's claim.

[52] At paras. 106-107, the majority explained why, in its view, Strathy J.'s decision on common issues in *Fulawka v. Bank of Nova Scotia*, 2010 ONSC 1148, 101 O.R. (3d) 93, is distinguishable:

> In the *Fulawka* case, there was evidence that the plaintiff was refused overtime because of the BNS Overtime Policy requiring prior approval: see *Fulawka* at para. 136. In contrast, in the present case, the appellant makes no allegation that she was denied overtime because she failed to obtain approval in accordance with the Policy. It is her evidence that she did not know about the Policy until December 2006, and that she was not paid overtime because her managers often refused to approve it when she filed records of her hours. However, her evidence also shows that sometimes she was paid for overtime work.
>
> In this case, unlike *Fulawka*, the proposed class contains employees doing a variety of different functions... The evidence here is clear that the reasons for working overtime differ among these groups because of the nature of their employment, and that the ability to obtain prior approval varies. In any event, the CIBC Policy permits approval after the fact, and there is evidence that some affiants were paid overtime even though they had not obtained prior approval.

[53] The majority agreed with the motion judge that the proposed common issues concerning class-wide remedies do not meet the test for commonality, stating, at para. 131:

> In the present case, the motion judge found that the harms alleged by the appellant were not common to the class nor caused by the alleged illegality of the Overtime Policy. Moreover, determining the legality of the Overtime Policy would not establish the Bank's liability or potential liability to members of the class for breach of contract or unjust enrichment. There would still need to be an inquiry into the circumstances of each class member to determine whether the Bank breached the employment contract or was unjustly enriched by the failure to compensate overtime work.

[54] The majority also considered and rejected the appellant's remaining objections to the motion judge's evidentiary rulings (at paras. 133-40) and to the costs award (at paras. 141-59).

(2) Dissent

[55] The dissenting judge gave detailed reasons explaining why she would have overturned the motion judge's order denying certification. She identified what she perceived as two errors in the motion judge's reasons warranting appellate intervention: i) the motion judge erred in law in holding that it is plain and obvious that CIBC's Current Policy is lawful under the *Code*; and ii) the motion judge committed a palpable and overriding error of fact in overlooking evidence in the record supporting the certification of most of the proposed common issues.

[56] The dissenting judge observed that, in conducting the s. 5(1)(a) analysis, the motion judge waded into the merits of the question whether the Current Policy is unlawful under the *Code* and resolved this debate in favour of CIBC. In so doing, she went beyond her mandated task of deciding whether it is plain and obvious that the claim cannot possibly succeed (at para. 166). Given the need to interpret employment standards legislation in a broad and generous manner, the dissenting judge found that it is not plain and obvious that the pre-approval requirement is consistent with s. 174 of the *Code* (at para. 182):

> The appellant alleges that class members are regularly required to work overtime in their jobs. If this overtime cannot be anticipated in advance then a policy requiring pre-approval will not serve to ensure that it is compensated for. Furthermore, a policy providing for post-approval only in "extenuating" circumstances will also discourage payment for overtime that is regularly incurred. A broad and generous interpretation of s. 174 could, in my view, lead to the conclusion that the CIBC's Overtime Policy is not in accordance with the provisions of the Code.

[57] The dissenting judge also did not agree that it is plain and obvious based on the existing jurisprudence that the time *in lieu* provisions in the Current or Former Policy are consistent with the *Code* (at paras. 189-92).

[58] The dissenting judge explained that the motion judge's rejection of the proposed common issues followed from her erroneous holding that it is plain and obvious that the Current Policy is lawful (at para. 196). The premise of legality resulted in the motion judge failing "to consider the evidence as to systemic

policies and practices" that would satisfy the minimum evidentiary basis of showing "some basis in fact" for the existence of a common issue. The dissent accepted that this evidentiary threshold is "some basis in fact", citing *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 25, and *Lefrancois v. Guidant Corp*., 2009 CanLII 30448 (Ont. S.C.), at para. 13, leave to appeal refused, [2009] O.J. No. 4129 (Div. Ct.).

[59] The dissenting judge reviewed in detail the evidentiary support for the alleged existence of the systemic practices and policies of CIBC that are said to have unlawfully deprived class members of appropriate compensation for overtime (at paras. 205-42). I refer to some of this evidence in discussing the common issues criterion.

[60] The dissent also discussed why she would have certified common issues 7 and 8 related to remedy and damages. She disagreed with the motion judge's conclusion that the appellant's case for aggregate damages does not fit the "*Markson* model" (at para. 247). She found, at para. 249, that the criterion in s. 24(1)(b) is met because the alleged violations of the *Code* "put all class members at risk of not being compensated for overtime that they were entitled to." If these allegations are proven at trial, then each class member may be entitled to declaratory or injunctive relief, and at least some class members will be entitled to damages. In addition, the dissent observed, at para. 250, that the rationale identified in *Markson* for permitting an aggregate assessment of damages also

applies in this case, namely, that "the Defendant has structured its affairs such that it is practically impossible to determine the extent of the breach".

[61] In the end, the dissent would have certified all of the proposed common issues except for issues 3.1 (duty to implement a system to ensure that the duties in common issues 2 and 3 were satisfied), 6.1 (limitation periods) and 9 (procedures for resolving individual claims).

[62] Like the majority, she would not have given effect to the ground of appeal that the motion judge erred in refusing to admit the solicitor's affidavit. However, she would have found that the expert evidence constitutes "some evidence that the problems with overtime payment being put forward by the Appellant are part of a pattern within the banking sector" (at para. 218).

E. ISSUES ON APPEAL

[63] The appellant raises the following three issues:[4]

> (1) Did the motion judge and the majority of the Divisional Court err in determining that it is "plain and obvious" that CIBC's Current Policy complies with the minimum standards for overtime compensation set out in the *Code*?
>
> (2) Did the motion judge err in finding (and the majority in deferring to her findings) that there are no common issues that would significantly advance the litigation?

[4] The appellant and the Law Foundation of Ontario did not pursue an appeal from the Divisional Court's order upholding the motion judge's costs award in favour of the respondent.

(3) Did the motion judge err in refusing to admit and consider other relevant evidence?

[64] My reasons for deciding the first two issues make it unnecessary to resolve the third issue.

[65] The parties agree that the motion judge's determination that it is plain and obvious that CIBC's overtime policy complies with the *Code* is a question of law that is reviewable on a correctness basis.

[66] The parties do not agree on the standard of review that applies to the second issue concerning the appropriateness of the common issues. The appellant submits that errors with respect to matters central to the proper application of s. 5 of the *CPA* displace the deference usually owed to class action judges, citing *Cassano v. Toronto-Dominion Bank,* 2007 ONCA 781, 87 O.R. (3d) 401, at para. 23, leave to appeal refused, [2008] S.C.C.A. No. 15; *Quizno's Canada Restaurant Corp. v. 2038724 Ontario Ltd.*, 2010 ONCA 466, 100 O.R. (3d) 721, at para. 37, leave to appeal refused, [2010] S.C.C.A. No. 348; *Anderson v. Wilson* (1999), 44 O.R. (3d) 673, at para. 12, leave to appeal refused, [1999] S.C.C.A. No. 476; and *Cloud v. Canada (A.G.)* (2004), 73 O.R. (3d) 401 (C.A.), at para. 39, leave to appeal refused, [2005] S.C.C.A. No. 50.

[67] In contrast, the respondent submits that the motion judge's conclusion that the appellant failed to meet the commonality requirement under s. 5(1)(c) of the *CPA* is reviewable only for palpable and overriding error, citing *Markson*, at para.

33, and the Divisional Court's decision in *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.* (2009), 96 O.R. (3d) 252, at paras. 24-28.

F. ANALYSIS

[68] In my view, the motion judge committed an error of law in her analysis under s. 5(1)(a) of the *CPA* warranting appellate intervention. Furthermore, in conducting the common issues analysis under s. 5(1)(c), the motion judge misconceived the appellant's action as being, in essence, a collection of individual claims for unpaid overtime. As the dissenting judge pointed out, the motion judge disregarded the appellant's evidence showing some basis in fact to support the existence of many of the proposed common issues concerning liability. This error in principle displaces the substantial deference otherwise owed to certification judges when considering the common issues criterion and calls for appellate intervention.

(1) The Courts Below Erred in Determining it is Plain and Obvious that CIBC's Overtime Policy Complies with the *Code*

[69] The motion judge and the majority of the Divisional Court viewed the appellant's claims for breach of contract and unjust enrichment as being premised on the fundamental allegation that CIBC's Current Policy is unlawful. They took a merits-based approach in concluding that the use of the term "required or permitted" in s. 174 of the *Code* is consistent with the pre-approval

requirement in the Current Policy. The motion judge's analysis, at para. 29, reflects this observation:

> Subsection 169(1) of the *CLC* [*Code*] sets a clear limit on hours of work which are not to be exceeded and creates the corresponding right of the employer to control the hours of work. Section 174 of the *CLC* expressly denies overtime treatment unless the employer expressly or impliedly asks the employee to work overtime, i.e. it was "required" or the employee asked permission to work overtime and was granted such permission expressly or impliedly, i.e. it was "permitted": *Matson v. Great Northern Grain Terminals Ltd.*, [2005] C.L.A.D. No. 401 at para. 32. Subsection 169(1) places the onus and responsibility on the employer to ensure that employees do not exceed these maximum hours thresholds, unless the exception in section 174 applies. Section 174 permits employees to exceed the maximum hour thresholds only where the employer has required or permitted the overtime work. The very language of the *CLC* therefore contemplates the right to pre-approve overtime. In order to "require or permit" an employee to work overtime, management must be directly involved in deciding whether the employee works overtime. Indeed, a pre-approval requirement is a way to ensure that an employer complies with s. 171 of the *CLC*, which states that the total hours worked by an employee in any week shall not exceed 48 hours.

[70] I recognize that, at the common issues trial, the motion judge's view may be found to be the correct interpretation of the relevant provisions of the *Code*. However, the time-honoured test that a plaintiff must meet at the certification stage under s. 5(1)(a) of the *CPA* is to establish that it is not plain and obvious

that its action will fail. As McLachlin C.J. admonished in *Hollick*, at para. 16, the test is not merits-based:

> Thus the certification stage is decidedly not meant to be a test of the merits of the action: see *Class Proceedings Act, 1992*, s. 5(5) ("An order certifying a class proceeding is not a determination of the merits of the proceeding"); see also *Caputo v. Imperial Tobacco Ltd.* (1997), 34 O.R. (3d) 314 (Gen. Div.), at p. 320 ("any inquiry into the merits of the action will not be relevant on a motion for certification"). Rather the certification stage focuses on the form of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action... [Underlining in original.]

[71] McLachlin C.J. explained, at para. 25, that the s. 5(1)(a) requirement is "governed by the rule that a pleading should not be struck for failure to disclose a cause of action unless it is 'plain and obvious' that no claim exists". Thus, the plaintiff is not required to establish that the action will succeed, and the motion judge should not entertain that question. Addressing that question digresses into the forbidden merits analysis, as explained in *Hollick*.

[72] I agree with Strathy J.'s observation in *Fulawka*, at para. 87, that: "[t]he *Code*'s use of the term 'required or permitted' is *arguably* inconsistent with a pre-approval requirement" (emphasis added). By providing that the only overtime work that CIBC must compensate is overtime work for which an employee receives formal authorization from a manager to perform (whether before or after the fact), the Current Policy arguably creates a narrower obligation to pay

overtime than that found in the “required or permitted” language of s. 174 of the *Code*.

[73] The motion judge and the majority viewed the pre-approval requirement as allowing CIBC to ensure that class members do not exceed the maximum hours of work thresholds imposed by the *Code*. This benign view of the purpose served by the pre-approval requirement ignores the factual assertions in the pleadings about the alleged reality of the workplace in CIBC retail branches.

[74] The pleadings in this case include the factual allegation that “class members are consistently required to work additional hours in order to complete the common duties of their position.” The pleadings also state:

> CIBC has required, encouraged or permitted class members to record only their standard hours of work and has discouraged employees from submitting claims for overtime. When class members have had the temerity to claim overtime, CIBC has often refused, as a matter of practice or policy, to pay for the hours worked and has done so without lawful excuse. In fact, as set out in the Current Overtime Policy ... in the absence of prior approval, CIBC will refuse to pay overtime to class members unless the class member establishes that extenuating circumstances are present.

[75] These factual allegations must be taken as proven for purposes of the test under s. 5(1)(a) of the *CPA*. If class members have routinely been required or permitted to perform overtime work for which they were not compensated due to the lack of management pre-approval, or because class members have been instructed by management not to record overtime hours, then it is not plain and

obvious that the breach of contract and unjust enrichment claims will fail. For the reasons provided by Strathy J., at paras. 78-81 of *Fulawka*, as repeated in this court's reasons in *Fulawka*, at para. 49, it is arguable that the pre-approval requirement in CIBC's Current Policy served as an institutional impediment to claims for overtime that would otherwise have been compensable under s. 174 of the *Code*.

[76] The fact that the Current Policy provides that overtime may be paid if there are "extenuating circumstances and approval is obtained as soon as possible afterwards" does not necessarily eliminate the inconsistency between the terms of the policy and the requirements of the *Code*. This element of the Current Policy recognizes that there may be situations where overtime is required or permitted, but not formally pre-approved by a manager. However, by limiting the prospect of being compensated for such work to situations where there are "extenuating circumstances" and where the employee obtains approval "as soon as possible thereafter", the Current Policy arguably creates prerequisites to compensation that are inconsistent with the requirements of the *Code* and the practical demands of the workplace.

[77] The parties and the courts below referred to various decisions of labour standards referees under the *Code* that have interpreted s. 174 in different ways. For example, one referee decision interprets "permitted" in s. 174 as putting the onus on employees to seek permission to work overtime: see *Matson v. Great*

Northern Grain Terminals Ltd., [2005] C.L.A.D. No. 401 (A.M.S. Melnyk), at paras. 32-35. Other referees have said that employers cannot avoid liability for overtime by permitting employees to work overtime and then refusing to compensate them for such work by requiring prior approval of overtime: see, e.g., *T-Line Services Ltd. v. Morin*, [1997] C.L.A.D. No. 422 (J.E. Emrich), at para. 34; *RSB Logistic Inc. v. Hale*, [1999] C.L.A.D. No. 548 (A.M. Wallace), at para. 31; and *Kindersley Transport Ltd. v. Semchyshen*, [2002] C.L.A.D. No. 4 (A.M. Wallace), at para. 35.

[78] The motion judge and the majority of the Divisional Court concluded that the latter line of cases does not support a conclusion that a pre-approval requirement is illegal, but rather these cases turn on their particular facts and on the referees' findings that the employer had required or tacitly approved overtime work in the circumstances: see the motion judge's reasons, at paras. 29-30, and the majority's reasons, at para. 50.

[79] In my view, referee decisions interpreting s. 174 of the *Code* are not decisive of the issue whether the appellant's pleaded claims disclose a reasonable cause of action under s. 5(1)(a) of the *CPA*. Even if referees had uniformly interpreted a pre-approval requirement as being consistent with s. 174 of the *Code*, it would be open to a court to conclude that a contrary interpretation is arguable. In any event, to say, as did the motion judge, that the "authorities relied on by Ms Fresco are fact-specific" ignores that the appellant has pleaded

the existence of facts that referees have found trigger the obligation to pay overtime in the absence of prior management approval. Thus, the courts below erred in concluding it is plain and obvious that the pre-approval requirement complies with the *Code*.

[80] As the motion judge noted, the pleadings only specifically attack the legality of the pre-approval requirement in the Current Policy. Nonetheless, she concluded it is plain and obvious that the time *in lieu* provision of the Current Policy is also lawful. The majority of the Divisional Court agreed with this conclusion and further held that the time *in lieu* provision in the Former Policy is lawful.

[81] My comments on the impermissible merits-based approach of the courts below apply equally to their analysis of the legality of the time *in lieu* provisions. Briefly put, for the reasons given by the dissenting judge, at paras. 189-92, it is at least arguable that the time *in lieu* provisions in the Current and Former Policy do not comply with the *Code*.

[82] These reasons would be sufficient to dispose of the first issue raised by the appellant. In my view, the courts below erred in concluding that it is plain and obvious that the pre-approval requirement and the time *in lieu* provision –

whether in the Current Policy or the Former Policy – comply with the *Code*.[5] However, I would also add that, contrary to the motion judge's view, the appellant's core claims for breach of contract and unjust enrichment are not solely premised on the allegation that CIBC's overtime policies are contrary to the *Code*.

[83] The appellant claims that CIBC has breached its contracts of employment with class members and its obligation to act in good faith in performing its contracts. In support of these claims, the appellant pleads that CIBC's practice of assigning routine tasks to class members that cannot be completed without working overtime, taken together with reductions in CIBC's workforce by more than 20 per cent over the past decade, and the direction given to class members to prepare time records that do not include overtime worked, result in class members being systemically denied overtime compensation for work they are required or permitted to perform.

[84] In other words, the appellant's claim does not turn exclusively or even primarily on the *per se* legality of the Current Policy or the Former Policy. The pleadings allege that CIBC's systems for assigning work, recording hours of overtime work, and its actual practices for compensating such work, breached

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[5] CIBC suggests on this appeal that only the Current Policy was in dispute on the certification motion. I do not accept this suggestion. As previously noted, at para. 18, the pleadings refer to an earlier overtime policy and allege that it was unlawful. In addition, on the certification motion, the appellant submitted a revised class definition with a class period starting on the effective date of the Former Policy.

the terms of class members' contracts of employment – including the duty to perform these contracts in good faith – and have unjustly enriched CIBC at the expense of class members. These systemic elements of the claim give shape to the common issues, as discussed next.

(2) Common Issues

[85] In assessing the common issues, the motion judge focused on the personal circumstances in which the individual affiants' claims for overtime arose. Illustrative of this perspective are the following passages from her reasons, at para. 63, describing the evidence of the appellant, nine other class members and a branch manager:

> Ms Fresco's own claim is a good example of the individual nature of the claims. Her claim would appear to depend on whether or not the accommodation that she was given for breast-pumping breaks is properly included as hours worked in the calculation of her entitlement to overtime. The claim of another class member turns on disputed evidence as to the length of her smoking breaks and whether this is to be included as time worked for the purpose of calculating overtime entitlement. Still another primarily bases her claim on hours worked between 8:00 and 8:30 a.m. in circumstances where she agrees that she arrives early at the branch because her husband drops her off on his way to work, but CIBC asserts that she was not required to begin work before 8:30 a.m. At least two of the affiants were part-time CSRs who on cross-examination acknowledged that they did not work overtime hours and that they were paid for all the hours they worked. As was the case with a number of other affiants, they mistakenly believed that they were entitled to be paid at

> the overtime rate whenever they exceeded their scheduled hours, even if those hours were less than 8 hours in a day or 37.5 hours in a week. In my view, this evidence does not provide a sufficient basis in fact to show the existence of systemic wrongdoing. What it shows is a number of individual circumstances that arise for disparate reasons and require individual resolution.

[86] This approach to the analysis of commonality under s. 5(1)(c) is fundamentally flawed. The evidentiary inquiry under s. 5(1)(c) of the *CPA* ought not to have been focused on whether individual class members actually worked overtime for which they were not compensated. Rather, the proper approach under s. 5(1)(c) involves asking, as the dissenting judge did, whether there is some basis in fact for the appellant's allegations that CIBC's bank-wide practices and policies prevented class members from receiving overtime compensation in accordance with the express or implied terms of their employment contracts.

(i) The appellant's evidence on the certification motion

[87] The dissenting judge summarized the appellant's evidence that provides a basis in fact to show the existence of systemic practices and policies of CIBC that allegedly had the effect of routinely denying overtime compensation: see paras. 205-18 of her reasons. It is unnecessary to repeat all of that evidence here.

[88] The evidence includes wording from CIBC's Current and Former Policy and the materials accompanying these policies. For example, the wording of the

Former Policy does not provide for any exception to the requirement that employees must obtain prior authorization from management before incurring overtime. The Current Policy allows for obtaining after-the-fact approval of overtime, but only permits compensation for such work in “extenuating circumstances” where “approval is obtained as soon as possible afterwards.”

[89] The Current Policy refers to obtaining approval of overtime after it is performed. However, the forms that class members submit when requesting approval of overtime hours only refer to pre-approval of overtime. CIBC’s “Overtime Pre-Approval Form” states that it is “in accordance with the CIBC Employee Overtime Policy (Canada) requiring pre-approval of any overtime worked.” CIBC’s evidence on the motion indicates that employees could also obtain payment for overtime by completing time sheets. CIBC’s standard form time sheet, filed as an exhibit to one of CIBC’s affidavits, states: “Overtime must be pre-approved by your Manager and is paid at time and a half”.

[90] Considering that both these forms for requesting overtime compensation specify that overtime must be pre-approved, class members may have concluded that “there is no point in recording overtime hours that they have worked, but did not obtain pre-approval for”: see the dissenting judge’s reasons, at para. 207. As found by the dissenting judge, at para. 208: “rather than mandating overtime entitlement for all employees who, despite the absence of approval, have been permitted or required to work overtime, there is some basis in fact to support the

Appellant’s position that the Policy acts to disentitle employees solely on the basis that they have not sought or obtained approval.”

[91] The dissenting judge next identified evidence that provides some basis in fact for the appellant’s assertion that the pre-approval requirement acted as a barrier to the payment of overtime, including the following evidence as summarized at para. 214 of her reasons:

> According to Ms. Fresco and the others who filed affidavits in support of the Claim, while overtime is expected and often worked, its compensation is discouraged. Pre-approval is hard to get, especially on a regular basis. Employees are not encouraged to record all the hours that they worked. Employees are discouraged from filling in time sheets that record overtime that has not been pre-approved. Performance assessments and reviews discourage the claiming of and payment of overtime. Willingness to work overtime is regarded as a positive factor in performance appraisals and employees are afraid to claim overtime for fear that this will impact adversely on their employment and/or advancement at CIBC. Therefore, while overtime is worked on a regular basis, employees rarely request payment for that overtime.

[92] The dissenting judge also referred, at para. 215, to an affidavit from Mark Hutchinson, a former branch manager of the CIBC branch where Ms. Fresco works, who confirmed that overtime is "inherent" in the class members’ positions; that branch managers have no budget for overtime; that employees are unrealistically expected to finish their work during scheduled hours; and that

employees are discouraged from claiming overtime. Further, in Mr. Hutchinson's words:

> Given that the overtime that arises cannot often be predicted, the requirement of the official policy of "pre-authorization" for overtime is unrealistic, and in most circumstances unworkable. It simply provides Managers and upper management with an excuse for refusing to pay overtime since prior authorization is not often sought, let alone granted. Furthermore, the overtime policy (which I only saw relatively recently as discussed in paragraph 50 below) provides that, for overtime to be paid, extenuating circumstances must exist where advance approval was not obtained. My experience was that the vast majority of overtime worked by me prior to becoming a manager, and by my employees once I became a manager, were not worked in extenuating circumstances.

(ii) CIBC's evidence on the certification motion

[93] At the certification motion, CIBC launched a full-scale assault on the evidence that the appellant contended provides a basis in fact for the common issues, filing almost six times the number of affidavits. CIBC argued that the primary effect of this evidence is that it demonstrates there is no basis in fact for common issues 2, 3, 5 and 6, concerning whether there is a systemic policy or practice of unpaid overtime at CIBC.

[94] Much of CIBC's affidavit evidence indicates that class members usually have sufficient time within their regularly scheduled hours to complete all their tasks and that overtime work is an unusual occurrence, but that when class members work overtime, they are compensated even if the overtime was not pre-

approved. CIBC also tendered evidence showing that different branches have different practices for filling out employees' time sheets and for keeping track of time *in lieu*. Moreover, CIBC took aim at the credibility of some of the evidence adduced by the appellant, particularly that of her former branch manager, suggesting his evidence "raises serious credibility concerns", noting that he is a friend of the appellant.

[95] I would make two points concerning the effect of CIBC's evidence. First, as pointed out by the dissenting judge, at para. 217, some of CIBC's evidence actually provides a basis in fact for the appellant's assertion that there is systemic issue of unpaid overtime at CIBC. For example, there is evidence from CIBC witnesses that the nature of the work performed by front-line employees can make it difficult to obtain pre-approval of overtime. There is also evidence in CIBC's records indicating that the practice of submitting time sheets that record overtime which was not pre-approved was discouraged.

[96] Moreover, evidence from one of CIBC's witnesses provides some basis in fact for the assertion that CIBC's policies and practices are not consistent with its obligations under the *Code*, and hence, with its contractual obligations to class members. In particular, CIBC's Executive Vice-President Human Resources, Jacqueline Moss, sent an email to all employees after this class action was commenced. The email states: "To be clear, under our policy, where overtime is requested or required by CIBC, overtime is paid." The email does not refer to

compensation for overtime work that is permitted by CIBC, in contrast with the language in s. 174 of the *Code*.

[97] Second, as was explained by the dissenting judge, at paras. 219-20, to the extent the respondent's evidence indicates there is not a systemic problem of unpaid overtime at CIBC, this evidence does not serve to negate the existence of the appellant's competing evidence. Nor does it fall to a court on a motion for certification to assess the credibility of a witness. The case law is abundantly clear that "the certification stage is not meant to be a test of the merits of the action": see *Hollick*, at para. 16.

(iii) Common issues 2, 3, 5 and 6 could be resolved on a class-wide basis

[98] In addition to attacking the evidentiary foundation for the existence of a systemic policy or practice of unpaid overtime, CIBC maintains – as it did in the courts below – that the appellant's proposed common issues concerning liability are not capable of being resolved on a class-wide basis. For example, CIBC argues that its evidence shows that different branches have different practices for recording hours of work and time *in lieu* and thus proposed common issue 3(a) – asking if CIBC breached an alleged record-keeping duty – lacks commonality because individual findings of fact will be required to resolve this issue.

[99] In *Fulawka*, at para. 128, Strathy J. rejected a similar argument by Scotiabank. His reasons likewise refute CIBC's contention that the diversity in

record-keeping practices at CIBC branches means that this proposed common issue cannot be determined on a class-wide basis:

> Scotiabank's position is that the Plaintiff has failed to advance any evidence of a systemic flaw in its recordkeeping practices, and because the implementation of those practices was at the branch level, any inquiry into how records were kept must be conducted branch-by-branch and cannot be resolved on a Class-wide basis. I do not accept this. It amounts to Scotiabank saying that its record keeping system was so decentralized, varied and idiosyncratic that every claim for overtime must be examined on a case-by-case basis. Scotiabank cannot point to its own record keeping failures to defeat certification… The bank had no consistent corporate policy or system applicable to all branches, for the tracking of overtime. It had no system of tracking time *in lieu* or of ensuring it was "cashed out". It is appropriate to ask whether this was a breach of a duty owed to the Class.

[100] CIBC also argues that there is no basis in fact for the appellant's assertion that the unpaid overtime claims being advanced by class members could be resolved on a class-wide basis. In attempting to foster the impression that the appellant's case is hopelessly individualized, CIBC points out that each of its branches comprises a unique working environment, with each branch having its own branch manager, who enjoys significant autonomy. Each branch is said to serve a "distinct community and clientele." As CIBC put it in its factum: "For that reason, the experience of employees in each branch – including the factors that contribute to whether there is any need for an employee to work beyond his or her scheduled hours – is unique to that branch and its manager." CIBC also

points to a lack of shared experience among the job positions held by class members: “Each of those positions has a different purpose, involves different activities and different responsibilities, requires different knowledge and skills, and involves different types of interactions with clients and other staff members.”

[101] In addition, CIBC contends that resolving the issue of its liability for unpaid overtime would require individual determinations of how many hours were worked by individual class members for which compensation was not received (including by way of time *in lieu*), and whether those hours were required or permitted by CIBC. Such determinations, it is said, would require a case-by-case analysis of whether the class member took unpaid breaks, or had other time away from work for non-related work purposes. Making these determinations would require individual evaluation of the evidence relating to each employee.

[102] The motion judge and the majority of the Divisional Court accepted that these differences in the individual experiences of class members undermine the existence of a common issue of systemic wrongdoing. In the majority’s words, at para. 90:

> Given the variety of jobs performed by class members, the different practices of different managers and branches, and the different experiences of the affiants put forward by the appellant, the motion judge very reasonably concluded that the evidence of the affiants did not show a common experience with respect to unpaid overtime. Therefore, there was no common

> issue of systemic wrongdoing that was a substantial ingredient of each class member's claim.

[103] In my view, these alleged differences in individual class members' experiences are not relevant to the systemic issues raised by the appellant and do not undercut a finding of some basis in fact for the common issues concerning liability. The terms and conditions in CIBC's overtime policies governing overtime compensation, and the accompanying standard forms that class members submit when requesting such compensation, apply to all class members regardless of their own particular job responsibilities or job titles. To the extent that the policies and record-keeping systems of CIBC are alleged to fall short of CIBC's duties to class members, or to constitute a breach of class members' contracts of employment, these elements of liability can be determined on a class-wide basis and do not depend on individual findings of fact.

[104] Moreover, resolving the issue whether CIBC had a duty to implement an overtime system that satisfies its obligations under the *Code*, and whether its actual system met these obligations, will advance the claim of every class member. As Strathy J. put it in *Fulawka*, at para. 127: "If a common issues judge were to find that there was such a duty [to implement an overtime system that satisfies CIBC's obligations under the *Code*] and that Scotiabank's system was unfair and unreasonable, the absence of pre-approval would not be a defence to an individual overtime claim."

[105] The resolution of proposed common issues 2, 3 and 5 concerning liability will not, as presently worded, be determinative of CIBC's liability for monetary relief to individual class members. However, as I explained in *Fulawka*, at paras. 130-32, the common issues in the present case can be fairly stated on the pleadings and evidence in a way that the common issues trial judge might find there is an evidentiary basis that could support a conclusion that all uncompensated overtime hours were required or permitted by CIBC. It would be necessary to add as a subset of common issues 2, 3 and 5 the additional question whether CIBC, in breaching its alleged duty to prevent class members from working overtime that it did not intend to compensate and its duty to accurately record all hours of work, thereby required or permitted all uncompensated overtime that was worked by class members. This aspect of the common issues is formulated in the companion reasons in *Fulawka*, at para. 131.

[106] Certain of the respondent's complaints about the lack of commonality do not pertain to the proposed common issues concerning liability, but rather pertain to individual issues that would arise in assessing the damages of individual class members. The fact that individual issues – including whether particular class members actually worked uncompensated overtime hours, and if so, how many overtime hours they worked – would remain after the common issues trial does not prevent a finding of commonality under s. 5(1)(c) of the *CPA*. As was explained in *Fulawka*, at paras. 143-44 and 156-58, the *CPA* affords ample

authority to create procedural mechanisms for resolving individual issues concerning damages.

[107] For these reasons, I agree with the dissenting judge's view that common issues 2, 3, 4 and 5 should be certified. These reasons also support the certification of common issue 6.

(iv) Common issues that should not be certified

[108] The dissenting judge refused to certify issues 3.1 (duty to implement a system or procedure to implement duties), 6.1 (effect of any limitation periods), and 9 (efficient procedures for dealing with individual issues). I agree that these three proposed common issues should not be certified. Common issue 3.1 is duplicative of common issues 2 and 3 and its resolution would not move the litigation forward. The issue of limitation periods is not an ingredient of the class members' claims, but instead may be relied on by CIBC in its defence. The question of how individual issues are best resolved is a procedural matter that would follow after the common issues trial.

[109] Unlike the dissenting judge, I would refuse to certify common issue 8(a) concerning an aggregate assessment of damages. For the reasons given in *Fulawka*, at paras. 110-39, the preconditions in s. 24(1) of the *CPA* for ordering an aggregate assessment of monetary relief cannot be satisfied in this case.

[110] The dissenting judge would have certified common issue 1 asking whether any parts of the Current Policy are unlawful, void or unenforceable for contravening the *Code*. Strathy J. refused to certify a common issue to this effect in *Fulawka.* I would refuse to certify common issue 1 on the basis that its resolution is not necessary to the resolution of the class members' claims. The appellant alleges, and CIBC does not dispute, that its statutory duties to appropriately compensate class members for overtime and to record all hours of work are incorporated into the terms of the class members' employment contracts. The certifiable common issues concerning whether CIBC has breached any of its contractual duties owed to class members subsume the legality issue posed by common issue 1.

G. CONCLUSION AND DISPOSITION

[111] For these reasons, I would allow the appeal from the Divisional Court's order and substitute an order certifying the class action. I would certify all of the appellant's proposed common issues with the exception of common issues 1, 6.1, 8(a) and 9.

[112] The parties may make brief written submissions on costs, with the appellant's submissions to be delivered within 10 days of the release of these reasons and the respondent's to be delivered within 10 days thereafter.

Released: "WKW" June 26, 2012

"W.K. Winkler CJO"
"I agree, S.E. Lang J.A."
"I agree David Watt J.A."

APPENDIX

PLAINTIFF'S LIST OF PROPOSED COMMON ISSUES

The Defendant's Overtime Policies and Recording of Hours Worked

1. Are any parts of the Defendant's Overtime Policies (from February 1, 1993 to the present) unlawful, void or unenforceable for contravening the *Canada Labour Code*?
    a. If "yes", which provisions are unlawful, void or unenforceable?

2. Did the Defendant have a duty (in contract or otherwise) to prevent Class Members from working, or a duty not to permit or not to encourage Class Members to work, overtime hours for which they were not properly compensated or for which the Defendant would not pay?
    a. If "yes", did the Defendant breach that duty?

3. Did the Defendant have a duty (in contract or otherwise) to accurately record and maintain a record of all hours worked by Class Members to ensure that Class Members were appropriately compensated for same?
    a. If "yes", did the Defendant breach that duty?

3.1. Did the Defendant have a duty (in contract or otherwise) to implement and maintain an effective and reasonable system or procedure which ensured that the duties in Common Issues 2 and 3 were satisfied for all Class Members?
    a. If "yes", did the Defendant breach that duty?

Breach of Contract

4. What are the relevant terms (express or implied or otherwise) of the Class Members' contracts of employment with the Defendant respecting:
    a. Regular and overtime hours of work?
    b. Recording of the hours worked by Class Members?
    c. Paid breaks?
    d. Payment of hours worked by Class Members?

5. Did the Defendant breach any of the foregoing contractual terms?

Unjust Enrichment

6. Was the Defendant enriched by failing to pay Class Members appropriately for all their hours worked? If "yes",
    a. Did the class suffer a corresponding deprivation?

b. Was there no juristic reason for the enrichment?

Limitation Periods

6.1. What statutory limitation periods, if any, apply to the claims of the class?

Remedy & Damages

7. If the answer to any of common issues 1-3 or 5-6 is “yes”, what remedies are Class Members entitled to?

8. If the answer to any of common issues 1-3 or 5-6 is “yes”, is the Defendant potentially liable on a class-wide basis? If “yes”,

    a. Can damages be assessed on an aggregate basis? If “yes”,

        i. Can aggregate damages be assessed in whole or part on the basis of statistical evidence, including statistical evidence based on random sampling?

        ii. What is the quantum of aggregate damages owed to Class Members?

        iii. What is the appropriate method or procedure for distributing the aggregate damages award to Class Members?

    b. Is the Class entitled to an award of aggravated, exemplary or punitive damages based upon the Defendant’s conduct? If “yes”,

        i. Can these damages award be determined on an aggregate basis?

        ii. What is the appropriate method or procedure for distributing any aggregate aggravated, exemplary or punitive damages to Class Members?

Non-Common or Individual Issues, If Any

9. To the extent that the claims of Class Members raise non-common or individual issues, what are the appropriate, most efficient and cost effective procedures for determining same?